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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/904,713	07/12/2001	Michael T. Yatcilla	631 07 PA	2928

7590 12/18/2002

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EXAMINER
TELLER, ROY R

ART UNIT	PAPER NUMBER
1654	7

DATE MAILED: 12/18/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/904,713	YATCILLA ET AL.	
	Examiner	Art Unit	
	Roy Teller	1654	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *22 October 2002* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-45* is/are pending in the application.

4a) Of the above claim(s) *32-45* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-32* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) *2* .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

This office action is in response to the restriction/election paper #5, received 10/22/02, which elected group I, claims 1-31 with traverse. Applicant stated that a search of group II, claims 32-45 would not be unduly burdensome for the examiner. This is not found persuasive because a search of group II would not necessarily include the process of making the product. In addition, a search for the invention of group II would not be a complete and through search of the pertinent patent and non-patent technical literature. For example, the subclass of group I is differently classified than group II. The requirement is deemed proper and is therefore made FINAL.

Specification

The use of the trademark Aminogen TM has been noted in this application. It should be capitalized wherever it appears and be accompanied by the generic terminology. Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-11, 13-17, 21-26 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ronzio et al. (USPN 5,762,936) in view of Parr et al. (Journal of the Science of Food and Agriculture 2000, 80, pp.-985-1012).

The claimed invention is drawn to a dietary supplement comprising a pharmaceutical excipient and vegetable protein bound phenolics. The vegetable protein bound phenolics are selected from the group consisting of buckwheat, sunflower seeds, soy beans, hops, mustard seeds, cottonseeds, peanuts, safflower seeds, rape seeds and flax seeds. The dietary supplement comprises approximately 25 to 95 percent by weight of the vegetable bound phenolics. Further, the dietary supplement has an antioxidant capacity of 2,500 to 200,000 micromoles of trolox equivalent per unit dose of the supplement. Finally, the dietary supplement has exogenous phenolics selected from the group consisting of phenolic acids, catechins, flavones, anthocyanidins, isoflavones and quercetin.

The claimed invention is also drawn to a food product comprising vegetable protein bound phenolics which have an antioxidant capacity of 500 to 20,00 micromoles of trolox equivalent per gram of food product.

It is noted that claims 11, 12, 17, 18, 19, 20, 26, 27, 29, 30 and 31 are drawn to a product by process. Even though product-by-process claims are limited by and defined by

the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed.Cir. 1985)(MPEP 2113).

Ronzio teaches an antioxidant derived from lentil which possess the ability to quench organic free radicals and scavenge superoxide, see abstract. Ronzio also teaches a lentil seed coat which contains 15 to 70% of vegetable protein bound phenols, see column 12, claims 18 and 19. Ronzio discloses an intermediate product containing vegetable bound phenolics in column 7, example 1, section (a) and (b). Ronzio discloses a lentil extract characterized by phenolics content in the range of from about 1 to about 6 milligrams of catechin equivalent per 10 milligrams of extract, see column 11, claim 1. Ronzio further discloses phenolics, including phenolic acids, flavones, proanthocyanidins and quercetin, see column 5, lines 36-37 and line 45. Ronzio teaches the invention can be used with foodstuffs, nutritional supplements and pharmaceutical agents, see column 6, lines 25-27. Ronzio does not teach the vegetable protein bound phenolics as catechins and isoflavones derived from soybeans, flax seeds, buckwheat, sunflower seeds, hops, mustard seeds, cottonseeds, peanuts, safflower seeds, rape seeds and flax seeds.

Parr teaches major dietary phenolics such as catechins and isoflavonids, along with soybeans and flax seeds having antioxidant properties, see page 997. Parr discloses that antioxidant activity is one important activity of phenolics, see page 991.

It would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made to have included the soybeans and flax seeds of Parr with

Ronzio's antioxidant preparation in order to increase the number of possible combinations of antioxidants available, because Parr teaches that phenolics present in plant foods contribute positively to long-term human health, see page 1004.

Conclusion

All claims are rejected.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Roy Teller whose telephone number is (703) 305-4243. The examiner can normally be reached on Monday-Friday from 5:30 am to 2:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Brenda Brumback, can be reached on (703) 306-3220. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3014.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.

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1654
12/12/02
RT

Brenda Brumback
BRENDA BRUMBACK
SUPERVISORY PATENT EXAMINER
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